

U.S. Department of Labor

**Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, D.C. 20001-8002**



Date: October 9, 1998

Case No. 97-INA-543

In the Matter of:

ELECTRONIC DATA SYSTEMS,

Employer,

on behalf of

SHEBA MIRZA,

Alien.

Before: Huddleston, Lawson and Neusner
Administrative Law Judges

FREDERICK D. NEUSNER
Administrative Law Judge

DECISION AND ORDER

This case arises from an employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of alien labor certification.¹ On July 8, 1998, this Panel remanded Employer's application for a ruling by the CO on Employer's motion for reconsideration/request for Board review. On July 21, 1998, the Board received the CO's ruling denying the motion. This matter is now ripe for review on the merits and has been reassigned to the same panel.

Background. The Employer's April 25 1996, application for alien labor certification for the permanent full time employment of the Alien as a "Financial Analyst" was classified as an Economist under DOT Occupational Code No. 050.067-010. The Employer required a baccalaureate degree in Finance or Economics with no further Training or Experience. As one of its "Other Special Requirements" the Employer also required a "Minimum GPA 3.0." AF 187,

¹ The certification of aliens for permanent employment is governed by section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20. We base our decision on the record upon which the CO denied certification and the employer's request for review, as contained in the appeal file ("AF"), and any written arguments. 20 C.F.R. § 656.27(C).

Form ETA 750 A, Items 13, 14, 15. The NOF denied the application, subject to the Employer's rebuttal, on grounds that the position was offered subject to requirements that were restrictive, as the requirement of a 3.0 Grade Point Average was not required for the position in the United States or in the DOT job description. The CO directed the Employer to file rebuttal evidence that its job requirements were not unduly restrictive. AF 85-86. By way of rebuttal evidence the NOF directed the Employer to file position descriptions of the same or similar jobs within the employer's organization which hold the same job requirements as those required in this application. AF 85. The CO later found in the Final Determination that the Employer's rebuttal failed to support its requirement of a 3.0 Grade Point Average, as it failed to proffer position descriptions of similar jobs with the same hiring criteria in its own firm.² The CO denied certification on grounds (1) that Employer's job requirements were not normal to this occupation, (2) that the special requirement was a preference and not an business necessity, and (3) that the special requirement was unduly restrictive. AF 47-48.

As part of its motion for reconsideration, the Employer filed new evidence that other companies routinely state grade point average requirements in job advertisements. The CO did not consider this new evidence on reconsideration, however, as it was filed too late to be weighed with Employer's rebuttal. On appeal the Panel remanded this case to the CO for further proceedings, noting that the Employer's additional proof could not be considered with the evidence of record, because it had not been considered by the CO on reconsideration, and citing **University of Texas at San Antonio**, 88 INA 071 (May. 9, 1988); **Capriccio's Restaurant**, 90 INA 480 (Jan. 7, 1992).

Discussion

The Final Determination following remand is based on the CO's finding that Employer failed to provide documentation requested by the CO in the NOF concerning the Employer's special requirement of a 3.0 grade point average, even though the NOF had explicitly directed the Employer to provide

position descriptions of the same or similar jobs within the employer's organization which hold the same job requirements as those required in this application.

AF 47, 85. After reviewing the Employer's rebuttal documentation again, we affirm the CO's finding on remand that the position descriptions that the NOF had specified were not filed in either the rebuttal or the motion for reconsideration. AF 49-82.

Instead of complying with the CO's directions, the evidence Employer appended to its request for review showed only that other companies routinely incorporated grade point average

²In addition, the CO found that the reasons Employer asserted in the rebuttal evidence that it did file simply stated a preference, rather than its business necessity for this recruiting standard, which precluded the referral of otherwise qualified U. S. workers.



requirements in job recruiting advertisements. While the finding of the CO clearly is supported by the Employer's failure to sustain the burden of proof, we observe that more than a decade ago the Board held *en banc* that, if the CO requests a document which has a direct bearing on the resolution on an issue and the evidence is obtainable by reasonable efforts, the employer must produce it. **Gencorp**, 87 INA 659 (Jan. 13, 1988) (*en banc*). This Employer neither produced the requisite proof nor offered a compelling reason to explain its failure to do so, even though job descriptions of the same or similar positions, which were requested in the NOF are directly relevant to proof that this special requirement is not unduly restrictive.

Accordingly, as we conclude that the CO properly denied labor certification on reconsideration of the evidence pursuant to the Order of Remand, the following order will enter.

ORDER

The Certifying Officer's Order denying certification following reconsideration on remand is Affirmed.

For the Panel:

FREDERICK D. NEUSNER
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.